

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 REPSOL YPF, S.A.,
5 REPSOL, S.A.,

6 Plaintiffs,

7 v. 12 Civ. 3877 (TPG)
8 REPUBLIC OF ARGENTINA, 12 Civ. 4018 (TPG)
9 CHEVRON CORP., 12 Civ. 8799 (TPG)

10 Before: Argument

11 Defendants.

12 -----x
13 New York, N.Y.
14 September 6, 2013
15 11:00 a.m.

16 HON. THOMAS P. GRIESA

17 District Judge

18 APPEARANCES

19 LATHAM & WATKINS LLP
20 Attorneys for Repsol YPF, S.A. plaintiffs
21 BY: CHRISTOPHER HARRIS
22 JASON VOLBE

23 QUINN EMANUEL URQUHART & SULLIVAN LLP
24 Attorneys for Plaintiff Repsol, S.A.
25 BY: STEPHEN A. BROOME

26 DOAR, RIECK, KALEY & MACK
27 Attorneys for Defendant Republic of Argentina
28 BY: EDWARD SCARVALONE
29 JONATHAN A. WILLENS

30 WILSON SONSINI GOODRICH & ROSATI P.C.
31 Attorneys for Defendant Chevron
32 BY: MICHAEL S. SOMMER
33 JESSICA MARGOLIS

1 (Case called)

2 THE COURT: Could we start with the lawsuit against
3 the republic about the disclosure statement. Who wants to
4 speak from the plaintiffs? I have some questions.

5 MR. HARRIS: Your Honor, Chris Harris of Latham &
6 Watkins for the plaintiff, Repsol. Just to clarify, we
7 represent Repsol in that matter and the bylaw matter, and Mr.
8 Broome from Quinn Emanuel represents Repsol in the Chevron
9 matter.

10 THE COURT: On the suit against the republic, what
11 relief are you seeking?

12 MR. HARRIS: We are seeking that the republic be
13 ordered to issue the disclosures required by regulation 13(d).
14 Those would be disclosures that are triggered by its control of
15 more than 5 percent of the shares of YPF.

16 THE COURT: After the expropriation?

17 MR. HARRIS: After having received control of them. I
18 believe as a technical matter the expropriation has not yet
19 occurred. It has announced its intent to expropriate, and it
20 has separately seized control of the shares through what is
21 called a temporary occupation under Argentine law. So they
22 have seized control of the shares and of the company and of all
23 the rights associated with the shares, but the actual
24 expropriation where they take legal title, that has not yet
25 been completed.

1 THE COURT: Who will speak for the republic?

2 MR. SCARVALONE: Your Honor, I will. Edward
3 Scarvalone of Doar Rieck Kaley & Mack. Would you like me to
4 respond?

5 THE COURT: Is Cleary Gottlieb not involved in this?

6 MR. SCARVALONE: Correct, Cleary Gottlieb is not
7 involved in the defense of this matter, your Honor. We
8 represent the republic both in the 13(d) lawsuit that your
9 Honor has inquired about as well as the other lawsuit against
10 the republic having to do with the bylaws of YPF.

11 THE COURT: I want to ask you about the issue about
12 the disclosure statement, the 13(d) statement. YPF is a public
13 company, right?

14 MR. SCARVALONE: Correct.

15 THE COURT: How long has it been a public company?

16 MR. SCARVALONE: It's been a public company since the
17 early '90s, when the republic went public with the stock.
18 There was an IPO referenced in both sides' motion papers
19 referring to an IPO in 1993.

20 THE COURT: OK.

21 MR. SCARVALONE: It was public from 1993 forward.
22 Last year, in or around April, the republic announced its
23 intention to expropriate a controlling interest in the company.
24 They chose to do that not by expropriating 100 percent of the
25 shares, not by launching a tender offer for a controlling

1 interest in the shares.

2 Rather, they chose to get control of the company by
3 means of the expropriation process limited to 51 percent of the
4 shares. They took that 51 percent from Repsol. It is that
5 process that has unleashed litigation both in this court, in
6 Argentina, and also before the World Bank arbitration tribunal
7 known as ICSID, the International Center for the Settlement of
8 Investment Disputes.

9 THE COURT: YPF has been a public company. It's been
10 registered with the SEC, right?

11 MR. SCARVALONE: I believe there is a registration
12 statement.

13 MR. HARRIS: That's correct, your Honor. YPF has been
14 filing required statements with the SEC since 1993 and
15 continues to be registered and continues to have its ADSs
16 traded on the New York Stock Exchange.

17 MR. SCARVALONE: If I could chime in, your Honor --

18 THE COURT: Don't chime in. What?

19 MR. SCARVALONE: YPF has continued to make disclosures
20 under various provisions of the U.S. securities laws.

21 THE COURT: There is a section 13(d), right?

22 MR. SCARVALONE: Correct.

23 THE COURT: My understanding is that someone who buys
24 5 percent or more of a public company must file a 13(d)
25 statement. Is that correct?

1 MR. SCARVALONE: Yes, that is correct, someone who
2 buys 5 percent or more. Argentina has not bought. Argentina
3 has expropriated.

4 MR. HARRIS: Your Honor, the statute actually is
5 triggered by acquiring beneficial ownership, which includes
6 control of shares, which is not in dispute here.

7 THE COURT: I have a very simple question. There is a
8 lawsuit and you pose numerous defenses. I don't understand why
9 the republic simply doesn't file the statement. It seems to me
10 that filing of the statement is indeed required by United
11 States law. I don't understand why there has to be a lawsuit.
12 I don't understand why there has to be a lawsuit followed up by
13 the numerous defenses that you have posed. Why does there have
14 to be any such lawsuit? Why does not the republic simply file
15 a statement? Is the republic not going to comply with United
16 States law?

17 MR. SCARVALONE: Your Honor, the republic has decided
18 to let YPF, the company, make public announcements about the
19 business plans and operations of the company.

20 THE COURT: You are not answering my question. Of
21 course the republic has decided. But it seems to me very, very
22 clear that United States law requires a statement by the
23 republic. Why doesn't the republic comply with United States
24 law?

25 You've got a public company, an Argentine company,

1 that regularly makes filings with the SEC in compliance with
2 United States law. Along comes an event which clearly required
3 the republic to file a statement. Why doesn't the republic do
4 what YPF was doing, file the required statements? Are we
5 having another instance where the republic violates the law? I
6 don't see why it does. Why doesn't it file a statement?

7 MR. SCARVALONE: Your Honor, may I answer? Your
8 Honor, the republic has made a decision that relies on two
9 well-thought-out principles. One is it will let the issuer
10 YPF, make announcements, as YPF has continued to do since the
11 expropriation. It makes regular announcements known as 6-Ks
12 that are filed on the SEC website, on the EDGAR system, that
13 make available to the world, current investors, prospective
14 investors, that make available to the world all the information
15 that would be required by 13(d).

16 Secondly, your Honor, and this is clear from the
17 legislative history and from the case law that interprets
18 section 13(d), the purpose of 13(d) is to alert the world, to
19 alert the marketplace, about prospective changes in corporate
20 control in order to give investors an opportunity to learn
21 about a potential tender offer that might take place. 13(d) is
22 not intended to address the situation, as we have here, where a
23 change of control has happened. It's happened in April of
24 2012, as Mr. Harris pointed out.

25 THE COURT: I think you are just dead wrong. Maybe

1 I'm dead wrong. My understanding is if someone acquires 5
2 percent or more, then the 13(d) statement is required. Am I
3 right or wrong?

4 MR. HARRIS: That's correct, your Honor. There is a
5 continuing obligation then to update. There is no exception
6 unless you avoid the requirements by seizing control and then
7 you have somehow evaded 13(d). It is the exact opposite.

8 MR. SCARVALONE: Our point is somewhat different, your
9 Honor. We will agree for purposes of the motion that the
10 plaintiffs state a claim for relief under 13(d). However, our
11 argument in our motion is that the relief they are seeking,
12 namely, a mandatory injunction requiring the republic to make
13 13(d) disclosure, that injunction cannot issue, because a 13(d)
14 injunction can only issue when it is issued in order to serve
15 the purposes of the statute, which is to alert the marketplace
16 to potential changes in control. It has no application here.

17 THE COURT: I think you are completely misreading the
18 statute, and your motion to dismiss is denied.

19 MR. SCARVALONE: Your Honor, I urge you to, if your
20 Honor has a moment, look at the authorities cited in our brief,
21 including the ICN Pharmaceuticals case.

22 THE COURT: The motion is denied. Thank you.

23 MR. SCARVALONE: Thank you, your Honor.

24 THE COURT: The motion is denied. I would hope that
25 the republic, upon reflection, would begin to do something it

1 has not done for the last 13 years in this court and in the
2 Court of Appeals, and that is comply with the law. I would
3 hope that the republic would decide to comply with this phase
4 of United States law, which doesn't hurt it a bit. There is no
5 need for a lawsuit. The motion to dismiss is denied.

6 Now let's go to the other lawsuit. This is against
7 the republic and Chevron or just Chevron?

8 MR. HARRIS: There are two different lawsuits. One is
9 against the Republic of Argentina for violation of the bylaws
10 for failing to make a tender offer. There is a separate
11 lawsuit against Chevron for its tortious acts, which Mr. Broome
12 from Quinn Emanuel is handling. I don't know which you would
13 prefer to discuss first.

14 THE COURT: Let's discuss the Chevron. No, let's
15 discuss the suit against the republic. Are you going to handle
16 that?

17 MR. HARRIS: Yes, your Honor.

18 THE COURT: OK.

19 MR. HARRIS: This lawsuit is a lawsuit based on a
20 contractual requirement in YPF's bylaws that was implemented in
21 1993, when the republic decided to take YPF public. To
22 encourage investors to purchase shares, they included a
23 provision in the bylaws that provided that if anyone, and in
24 particular if the republic, were to attempt to take control of
25 YPF again, it provided an exit mechanism for shareholders, that

1 the republic would be required to make a tender offer for all
2 the shares. The reason for this was because people don't want
3 to invest in a government-controlled company that may not have
4 the same interests and profit motives that a private company
5 does.

6 So, to encourage people to invest, they included this
7 contractual requirement in the bylaws that is triggered, and
8 there is a whole separate section, section 28 of the bylaws,
9 specific to an acquisition of control or of possession of the
10 shares by Argentina exactly that triggers this bylaw
11 requirement to make a tender offer. Since Argentina has
12 indisputably taken control of the shares, and is no dispute
13 about that, the bylaw requirement has been triggered and they
14 are required to make a tender offer.

15 This lawsuit is a class action on behalf of the 49
16 percent of the shares that are not subject to the
17 expropriation. It is not dealing with the shares that
18 Argentina is expropriating. It is dealing with the remaining
19 minority shares and is seeking to require Argentina to comply
20 with its contractual requirements or to provide damages for
21 failing to have done so.

22 THE COURT: I don't completely understand what good
23 someone gets out of a tender offer under the circumstances
24 here.

25 MR. HARRIS: Do you mean because Argentina may choose

1 not to comply with yet another U.S. order?

2 THE COURT: No, I'm not talking about that. What
3 would a tender offer do?

4 MR. HARRIS: What is important here is in a tender
5 offer, the bylaws have in it a formula for what is the price
6 that the shares will be acquired at. That price is much higher
7 than the current now-depressed trading price of the YPF shares.
8 It is based on a number of factors, but essentially, among
9 other things, it looks at the pre-expropriation price.

10 What it is intended to do is to give these minority
11 shareholders a chance to exit at the price before the price was
12 driven down by the government having seized control. It would
13 give them essentially a lot of money and would recoup some of
14 the damages that they have suffered as a result of Argentina
15 taking control of YPF.

16 THE COURT: The tender offer doesn't allow Repsol to
17 stay in?

18 MR. HARRIS: That's correct, and this lawsuit does not
19 challenge the expropriation in any way. It does not challenge
20 Argentina's control of the shares. All it does is seek to the
21 obtain contractually required compensation for Repsol and the
22 other minority shareholders who have a contractually required
23 right to an exit at a certain calculated price under the
24 bylaws.

25 THE COURT: So it is a class action. Is Repsol part

1 of the class?

2 MR. HARRIS: Repsol is part of the class because
3 Repsol owned more than the 51 percent that is subject to the
4 expropriation. Repsol owned other shares above 51 percent. In
5 that class action, we represent Repsol and the other lead
6 plaintiff, Texas Yale as well, as representatives on behalf of
7 the class of all of the minority, the 49 percent that has not
8 been subject to expropriation.

9 THE COURT: The tender offer would be made by?

10 MR. HARRIS: It would be made by the Republic of
11 Argentina. It would be made through several mechanisms, but
12 they include publication of the offer in a newspaper in New
13 York and various other mechanisms to communicate the offer to
14 all the holders of this class of shares. All of that is laid
15 out in the bylaws.

16 THE COURT: The bylaws of YPF?

17 MR. HARRIS: That's correct.

18 THE COURT: You are saying that due to the
19 expropriation, the republic has committed some act which
20 invokes the bylaws of YPF?

21 MR. HARRIS: That's right, the expropriation and this
22 related action called the temporary occupation, which is where
23 they seize control even before they have legally acquired the
24 shares. Having seized control and the rights associated with
25 the shares, that then triggers the bylaw requirement to make a

1 tender offer for all the shares. The litigation does not seek
2 to stop the expropriation or seek to stop Argentina's control.
3 It is just seeking on behalf of the remaining 49 percent to
4 have this tender offer made.

5 THE COURT: You seek injunctive relief against the
6 republic, right?

7 MR. HARRIS: Injunctive relief to require the tender
8 offer. Also, alternatively, damages for the failure to make
9 the tender offer.

10 THE COURT: There is this thing called the Foreign
11 Sovereign Immunities Act. How do you get around that?

12 MR. HARRIS: Excellent question. We fit under two
13 prongs of the commercial activity prong. The first prong has
14 to do with actions in the United States. Here what was
15 required to happen was Argentina was required to make a tender
16 offer in the United States to the U.S. holders of the ADSs that
17 are registered on the New York Stock Exchange.

18 The various mechanisms that are specified in the
19 bylaws require the tender offer to occur in the United States
20 for the U.S. shareholders. The bylaws themselves recognize
21 that the tender offer occurs outside Argentina. It talks about
22 when you make the tender offer, there are requirements of the
23 various jurisdictions, plural, where the tender offer occurs,
24 the requirements of those stock exchanges will apply.

25 At least for our class, the class of holders of U.S.

1 registered ADSs, that tender offer would have occurred in the
2 U.S. A tender offer is inherently a commercial activity. They
3 failed to make that tender offer. That is an omission, a
4 commercial action that should have happened in the U.S. So
5 that satisfies the first prong of the commercial exception,
6 which is for commercial activity in the U.S.

7 It also satisfies the third prong, which is commercial
8 activity abroad that has an impact in the U.S. This whole
9 course of conduct -- registering the shares, making the
10 original IPO both in the U.S. and Argentina, and now various
11 actions in Argentina, as well where part of the tender offer
12 would take place, that occurs, parts of it, in Argentina as
13 well -- those are also commercial activities, and some of them
14 occur in Argentina. I don't think there is any dispute that
15 there are activities related to this lawsuit that occurred in
16 Argentina. So the only real question is whether this has a
17 direct impact on the U.S.

18 There is a clear line of cases saying that if you fail
19 to perform a required action in the U.S., that satisfies that
20 third prong for a direct impact. The required action that
21 should have happened is both a tender offer and also, if
22 shareholders were accept the tender, payment of money to them
23 in the U.S. So there are a couple of impacts on the U.S. that
24 satisfy the third prong as well.

25 THE COURT: Let's look specifically at the language of

1 the Foreign Sovereign Immunities Act. I should have brought
2 the book up. Is it quoted in the briefs?

3 MR. HARRIS: It is, your Honor. I don't know if you
4 are looking at our memorandum of law in opposition. If you
5 have that one in front of you, the language is on page 3 and 4.
6 The footnote at the bottom of 4 has the full text, although it
7 is small type.

8 THE COURT: Footnote at the bottom of what?

9 MR. HARRIS: Of page 4.

10 THE COURT: I don't see a footnote.

11 MR. HARRIS: Are you looking at plaintiff's memorandum
12 of law or the defendant's memorandum of law?

13 THE COURT: I'm looking at the plaintiff's. I have
14 the papers in order and I have a brief called memorandum of law
15 in opposition Latham & Watkins.

16 MR. HARRIS: Yes, your Honor, that is our brief.

17 THE COURT: I have a page 4 which has a heading at the
18 bottom "A. Defendant's beneficial ownership," and so forth.
19 Am I in the right brief or not? Maybe I'm not.

20 MR. KOLBE: Your Honor, we are looking at the brief,
21 plaintiff's opposition to defendant's motion to dismiss in case
22 12-3877. If you look at the stamp from ECF at the top of the
23 brief, it is document 16.

24 MR. HARRIS: I think the brief that talks about
25 beneficial ownership, that brief is from the prior case we

1 talked about, the 13(d) case.

2 THE COURT: That's right. We are in a transition in
3 our office, and I think we don't quite have everything up here.

4 MR. HARRIS: We have a clean copy of the plaintiff's
5 brief.

6 THE COURT: Good. I've got the brief. Go ahead. I
7 wanted to focus on the language of the Foreign Sovereign
8 Immunities Act.

9 MR. HARRIS: If you turn to page 4 of the brief, does
10 that have the footnote at the bottom?

11 THE COURT: Yes, it does. What is the language you
12 are relying on?

13 MR. HARRIS: If you look at 1605(a)(2), it has three
14 clauses in it. We are relying on the first and the third
15 clauses. The first clause is in which the action is based upon
16 the commercial activity carried on in the United States by the
17 foreign state. That is the first clause. Then also the third
18 clause, which starts on the third line of that and says, "or
19 upon an act outside the territory of the United States in
20 connection with the commercial activity of the foreign state
21 elsewhere and that act causes a direct effect in the United
22 States."

23 We are relying on the first, commercial activity in
24 the United States, and the third, an act outside the territory
25 of the United States that causes a direct effect in the United

1 States.

2 THE COURT: Again, what is the commercial activity
3 carried on in the United States?

4 MR. HARRIS: There are two. Under that first clause
5 it is satisfied either if there is a course of conduct that is
6 commercial or if the specific transaction at issue is
7 commercial. Both of those are satisfied here.

8 The course of conduct here is the Republic of
9 Argentina's decision to privatize YPF through a U.S. offering
10 in which the majority of the shares were sold in the U.S. to
11 make YPF a U.S. registered company and then to take back
12 control of this U.S. registered company and, as part of that,
13 taking back control of many of the shares that are registered
14 in the U.S. as well. That is the course of conduct. There are
15 many cases saying that accessing the U.S. markets is a
16 commercial activity carried on in the U.S.

17 THE COURT: Accessing the stock market?

18 MR. HARRIS: Yes.

19 THE COURT: Go ahead.

20 MR. HARRIS: The second reason we satisfy it is the
21 particular action at issue in a lawsuit is also commercial.
22 This lawsuit is about an omission, and that is a failure to
23 make a tender offer, a contractually required tender offer. A
24 tender offer is inherently commercial in nature. It is
25 something that private and public companies, any, can do.

1 There is nothing inherently sovereign about it. It is
2 commercial activity. So the Omission here, the particular act
3 in question, was also a commercial action. Both of those
4 satisfy the requirement for an action in the U.S.

5 The dispute we have with the defendant here is on the
6 second part, the particular action at issue, whether the action
7 is the failure to make a tender offer or Argentina's decision
8 not to make the tender offer. The Republic of Argentina said
9 the relevant issue is its decision and that decision occurred
10 in Argentina. But that is not what this lawsuit is about. Its
11 decision-making process is simply irrelevant to our breach of
12 contract dispute.

13 The reason why the contract was breached was because
14 Argentina didn't take an action, it failed to act, and that
15 action was supposed to be in the U.S. That was to make a
16 tender offer through making publication in the New York
17 newspapers, through making a tender offer on the New York Stock
18 Exchange to purchase securities. That omission occurred until
19 the U.S. regardless of where its decision occurred. Those are
20 the actions, both the course of conduct and the specific
21 action, that occurred in the U.S. and that were commercial
22 activity.

23 THE COURT: Why don't you go ahead and finish.

24 MR. HARRIS: The other reason why we satisfied the
25 Foreign Sovereign Immunity Act is because of the third prong,

1 which is commercial activity abroad. Again, there was both a
2 whole course of conduct that was commercial in deciding to take
3 YPF public and that occurred in Argentina as well, and then
4 deciding not to make a tender offer in Argentina as well for
5 the Argentine shareholders. Both of those satisfy. Those are
6 both commercial activity that occurred abroad. I don't think
7 there is any dispute that those activities happened, they are
8 commercial, and they occurred abroad.

9 The real question is whether this satisfies the direct
10 effect component. The Supreme Court has held, this is in the
11 Weltover case, that where a sovereign fails to perform an act
12 required to take place in the United States, that necessarily
13 has a direct effect in the United States. That is the Weltover
14 case. There are Second Circuit cases, like Commercial Bank of
15 Kuwait, that also follow that.

16 Here, their failure to make a tender offer had two
17 direct effects. The first is they failed to make the tender in
18 the U.S. by publishing the offer in New York newspapers, by
19 filing the offer with the New York Stock Exchange, by filing
20 the offer with the SEC. All of those are explicitly required
21 in the bylaws as part of the tender offer. So that is the
22 tender offer that was supposed to be in the U.S.

23 It also, in addition to failing to make the tender
24 offer in the U.S., had the effect that U.S. shareholders aren't
25 getting paid the money they would get if they had chosen to

1 accept the tender offer. Both of those are a direct effect in
2 the United States under Weltover.

3 The only other thing I would add on that is the bylaws
4 themselves recognize that the tender offer occurs outside of
5 Argentina. It occurs where the tender itself takes place.
6 That is because the bylaws themselves say that in order to
7 determine how you make a tender offer, you look at the stock
8 exchange requirements of all the jurisdictions, plural, where
9 the tender offer takes place. That is inherently a recognition
10 in the bylaws themselves that the tender offer isn't in
11 Argentina, it is wherever the shareholders are.

12 THE COURT: What you are essentially doing is making
13 arguments in opposition to the motion to dismiss, right?

14 MR. HARRIS: Yes, your Honor.

15 THE COURT: Let's have the argument in favor of the
16 motion to dismiss this case against the republic.

17 MR. SCARVALONE: Your Honor, we argue immunity under
18 the Foreign Sovereign Immunities Act. We argue the Act of
19 State doctrine. We argue improper venue. We argue forum non
20 conveniens. We also argue under the language of the bylaws.
21 We argue that the complaint does not state a claim, because the
22 bylaws don't stand for the propositions that Repsol says they
23 stand for.

24 Shall I turn first to the immunity argument, your
25 Honor?

1 THE COURT: Sure.

2 MR. SCARVALONE: Your Honor, much of what counsel has
3 spoken about in terms of what the case is based upon concerns
4 actions in the early '90s in connection with the IPO that you
5 have heard about this morning. Plainly, the complaint is not
6 based upon an IPO that took place in the early '90s. It is
7 based upon an expropriation that was announced last year and
8 that is ongoing.

9 Shares have not yet been acquired by Argentina,
10 although Argentina does have control of those shares. There is
11 an ongoing process that will result eventually in the
12 acquisition of shares. That acquisition has not happened yet.
13 And the bylaws, in particular the tender offer obligation that
14 Repsol has raised, is triggered by an acquisition. It is not
15 triggered by control or a change of control. It is triggered
16 by an acquisition that has not happened yet.

17 THE COURT: Why hasn't it happened?

18 MR. SCARVALONE: Because, your Honor, what Argentina
19 has announced is an intention to acquire shares. That is
20 indeed how the complaint refers to it. There has been
21 announced an intention to acquire shares. That acquisition
22 only takes place after a valuation has been done that
23 determines what is the value of the expropriated property.
24 Then, upon determination of the value, the property owner, in
25 this case Repsol, would be compensated for the value of the

1 property that the republic is expropriating. Until that
2 payment has been made, ownership still resides in Repsol.

3 THE COURT: It seems to me that is a supertechnical
4 argument. Let's pass that.

5 MR. SCARVALONE: That is an argument arising from the
6 language of the bylaws. I jumped the gun. Let me back to
7 immunity, your Honor.

8 Your Honor, both our Court of Appeals and the Court of
9 Appeals in the D.C. Circuit in a case called Rong, which we
10 cite in our brief, have held that obligations that arise from
11 the exercise of sovereign power, such as expropriation, such as
12 borrowing from the World Bank, from the IMF, which is something
13 only a sovereign can do, obligations that arise in those
14 uniquely sovereign contexts are not actionable as commercial
15 activity.

16 That is not just in the Rong case that I mentioned,
17 but one of the bond cases that went up to the Second Circuit,
18 EM Ltd. v. Republic of Argentina, at 473 F.3d, which involved
19 whether the republic's repayment obligation under an IMF
20 borrowing vehicle, whether that repayment obligation was
21 commercial activity. The circuit said no, it isn't.

22 And you know why it isn't? It's because that
23 repayment obligation is something only a sovereign can get
24 involved in. Only a sovereign can borrow from the World Bank.
25 Only a sovereign can expropriate property. Obligations that

1 arise from expropriation of property are not actionable as
2 commercial activity, and for good reason, your Honor.

3 The Sovereign Immunities Act already has an
4 expropriation exception. It is in section 1605(a)(3), where
5 Congress set out many examples of activities that are excepted
6 from sovereign immunity. Just as there is a commercial
7 activity exception, there is also an expropriation exception.
8 Congress thought long and hard about what the scope of that
9 exception would be. Lo and behold, it doesn't cover this.

10 THE COURT: What does it cover?

11 MR. SCARVALONE: It covers expropriation of property
12 not in conformance with international norms. What that has
13 been construed to mean is expropriation that is without
14 process, expropriation that is not accompanied by a declaration
15 of public need or legislation, which is what we have here.

16 Argentina didn't just wake up one day and grab shares
17 of stock. There was an executive decree that declared the
18 public interest in the republic controlling YPF, which the
19 nation depends on for the supply of fossil fuels. That
20 executive decree was followed in short order by legislation,
21 law number 26,741, passed by the Argentine Congress that
22 declares this 51 percent of YPF shares subject to expropriation
23 and declares also that the valuation and all that expropriation
24 process will occur pursuant to existing Argentine law about
25 expropriation of property, much in the way the United States

1 has statutes on the books that regulate how the United States
2 can go about condemning property, acquiring property to build
3 highways, to build courthouses and the like.

4 That is one point that I think is important for your
5 Honor to focus on, appellate authorities that say that
6 obligations that arise from the exercise of sovereign power,
7 like an expropriation, are not actionable as commercial
8 activity.

9 THE COURT: What is excepted, in other words, if there
10 is a process and compensation, and so forth, that is not an
11 expropriation which can be sued on, right?

12 MR. SCARVALONE: Correct. Under the expropriation
13 exception of the statute, that can't be sued on. That is
14 presumably why plaintiffs in the class action, putative class
15 action lawsuit, have not argued that the conduct falls within
16 the expropriation exception. They are only arguing under the
17 commercial activities exception.

18 One of our points that we briefed is that commercial
19 obligations, such as obligations under bylaws, are not
20 actionable under the commercial activity exception, because
21 they arise from sovereign power, the exercise of sovereign
22 power. The statute, in particular this exception, draws a
23 clear distinction between the exercise of sovereign power,
24 which is not actionable, and the exercise of commercial
25 authority, which can be actionable if it fits within one of the

1 clauses that your Honor has reviewed with counsel this morning.

2 THE COURT: The expropriation is what really triggered
3 the whole thing. The plaintiffs are relying very heavily on
4 the bylaw provision as, in effect, being part of a contract.
5 The bylaw requirement is there. Why isn't the bylaw
6 requirement, the placing of the bylaw requirement -- the bylaw
7 requirement is a bylaw of YPF, right?

8 MR. SCARVALONE: Correct.

9 THE COURT: Let's assume for the moment that the
10 expropriation either has taken place or it is going to take
11 place and that is a fact of life. Is it not correct that the
12 acquisition of 51 percent by the republic does under the
13 literal terms of the bylaw trigger the bylaw?

14 MR. SCARVALONE: The bylaws only apply to purchases of
15 stock. It does not by its terms -- we are talking about the
16 tender offer obligation here, correct?

17 THE COURT: Yes.

18 MR. SCARVALONE: The tender offer obligation does not
19 apply to expropriations. If it did, it would have said so.
20 Our expert Javier Errecondo cites in his affidavit and attaches
21 as an example a financial instrument of YPF, namely, a bond
22 issuance from 1998, in which the bond issuance plainly
23 differentiates between expropriations and acquisitions. It
24 specifically references the expropriation possibility and what
25 may happen in the event of expropriation. These bylaws don't

1 do that, your Honor.

2 THE COURT: Can we look at the bylaw? Is the bylaw
3 quoted somewhere?

4 MR. SCARVALONE: The bylaws are quoted in part
5 throughout the parties' briefs. They are also attached as an
6 exhibit to my moving declaration as Exhibit E. I don't know if
7 your Honor has that.

8 THE COURT: Would it be possible to hand me a copy of
9 the relevant language?

10 MR. BROOME: I have a copy, your Honor. Actually, I
11 don't have a clean copy.

12 MR. HARRIS: Here is one.

13 THE COURT: Where is the relevant language of the
14 bylaw?

15 MR. SCARVALONE: The provisions that the parties cite
16 are bylaw section 7 and also section 28, which should be at or
17 about the last page of the bylaws.

18 THE COURT: Section 7, what is the relevant language?

19 MR. SCARVALONE: In section 7, your Honor, section
20 7(d) refers to takeover and reads, "If the terms of subsections
21 (e) and (f)" of this section "are not complied with, it shall
22 be forbidden to acquire shares for securities of the
23 corporation, whether directly or indirectly, by any means,"
24 etc., and I'm skipping down, "if as a result of such
25 acquisition the purchaser becomes the holder of or exercises

1 control of the class D shares of stock of the company."

2 THE COURT: What is the language you are relying on?

3 MR. SCARVALONE: In part, your Honor, I am relying on
4 that language because we are not a purchaser. There is no
5 reference to expropriation and we are not a purchaser.

6 THE COURT: Isn't the key word "acquire"?

7 MR. SCARVALONE: Correct, to acquire shares, which we
8 have not done yet. The complaint concedes we have not done
9 that yet. The complaint concedes we have announced an
10 intention to acquire.

11 THE COURT: Let's pass that. Let's assume this goes
12 through. There is no use to adjourn until six weeks from now,
13 after the thing has all gone through. Let's assume it goes
14 through. Is it not an acquiring? I see the word "acquire."

15 MR. SCARVALONE: Later on, your Honor, in the passage
16 that I read, it equates acquisition with purchase.

17 THE COURT: Where is that, please?

18 MR. SCARVALONE: That is at the end of the fourth
19 line, the clause beginning with the word "if," "if as a result
20 of such acquisition the purchaser becomes the holder of or
21 exercises control of class D shares of stock."

22 Where the parties disagree, your Honor, is that
23 plaintiffs argue that the mere exercise of control triggers the
24 tender offer obligation. We argue, by contrast, that the
25 bylaws' repeated references to acquisition and to purchase,

1 which also appear in section 28, make clear that the tender
2 offer obligation only applies in connection with your classic
3 corporate takeover via acquisition of stock, which is not what
4 we have here. We have expropriation.

5 THE COURT: What is the relevant language in section
6 28?

7 MR. SCARVALONE: Section 28(a) begins, "The provisions
8 of subsections (e) and (f) of section 7 shall apply to all
9 acquisitions made by the national government, whether directly
10 or indirectly, by any means or instrument, of shares or
11 securities of the corporation." Again the word "acquisition,"
12 which section 7 previously equated to purchase.

13 THE COURT: It seems to me if there is a narrowing in
14 7, 28 is somewhat broader.

15 MR. SCARVALONE: We would argue that you can't read
16 section 28 in isolation from section 7. If section 7 uses
17 "acquisition" in a particular way and equates it with purchase,
18 it would be illogical to read the word "acquisition"
19 differently in section 28.

20 THE COURT: I don't really agree with that.
21 Acquisitions by the national government can take unique forms,
22 as they did here. The real problem I have is that I think the
23 case law and actually the meaning of the statute, it is
24 difficult for me to see how the failure to make a tender offer
25 is commercial activity. I think the cases go against that

1 idea. Right?

2 MR. SCARVALONE: Your Honor, I would also submit that
3 in the case of a so-called failure --

4 THE COURT: You have cited cases against that whole
5 proposition.

6 MR. SCARVALONE: Right. And there are cases that say
7 the failure to act or decision not to act is not something that
8 takes place here in the U.S., it takes place in the foreign
9 country.

10 THE COURT: I think we had better finish argument on
11 this motion on this case. Unless somebody else has somebody to
12 add, I will simply reserve decision.

13 MR. SCARVALONE: Your Honor, I could briefly address
14 the other issues if you would like, and I can do it in five
15 minutes' time, too.

16 THE COURT: Please.

17 MR. SCARVALONE: We also argue the Act of State
18 doctrine, which Chevron argues at some length in their motion,
19 so I will summarize it very briefly. The Act of State doctrine
20 prevents a U.S. court from ruling on the validity or invalidity
21 of a sovereign action that takes place within the sovereign
22 country. We argue this is a straightforward application of
23 that doctrine.

24 What the plaintiffs are asking this Court to rule on
25 is the validity or invalidity of the Argentine government

1 deciding either not to do a tender offer or, in the 13(d) case,
2 not to make a disclosure under the securities laws. There is
3 no question that that is something that takes place within the
4 foreign state, the Act of State doctrine applies.

5 THE COURT: I am a little bit confused by what you are
6 arguing. I thought the act of state that you were talking
7 about was the expropriation. Isn't that the act of state?

8 MR. SCARVALONE: Yes. The expropriation --

9 THE COURT: Please put aside anything that has to do
10 with the different stages of the acquisition. Put it aside.

11 MR. SCARVALONE: I can do that.

12 THE COURT: Let's assume it is a done deal. Now, as a
13 done deal, is that an act of state or not?

14 MR. SCARVALONE: It falls within the Act of State
15 doctrine because what they are challenging is the decision of
16 the Argentine government to acquire control of YPF by means of
17 an expropriation without at the same time doing a tender offer
18 for the remaining shares. The Argentine government made a
19 decision not to acquire or seek to acquire 100 percent of the
20 YPF shares. They determined to acquire 51 percent and no more.
21 That's what the legislation says.

22 What Repsol and plaintiffs are doing, in effect, is
23 challenging the republic's decision to expropriate without at
24 the same time acquiring the remaining 49 percent by way of
25 tender offer. That falls squarely within the Act of State

1 doctrine.

2 Your Honor, we also have provided your Honor arguments
3 in cases regarding the doctrine of forum non conveniens.
4 Plaintiffs are litigating this very same issue having to do
5 with how to construe the bylaws in Argentina. There are at
6 least three different lawsuits pending right now that Repsol
7 has brought that are pending in Argentina that raise this very
8 claim, namely, whether the bylaws require the making of a
9 tender offer.

10 Therefore, what we have here is a serious potential of
11 duplicative litigation, a court in New York being asked to rule
12 on the same bylaws provision that courts in Argentina are being
13 asked to rule on. The cases have decided, and we cite in our
14 brief a case from this Court, where that precise risk of
15 duplicative litigation and inconsistent rulings is grounds that
16 tip the balance in favor of a forum non conveniens dismissal,
17 as well as the other classic forum non conveniens arguments.
18 Namely, Argentina plainly has a much more serious interest in
19 determining the application of its law relative to the
20 expropriation process and to whether or not the bylaws
21 obligation survives the expropriation process.

22 Our expert, Javier Errecondo, concludes in his
23 affidavit, which we submitted on reply, that Argentine law
24 prevents the bylaws obligation from trumping the expropriation
25 process. In other words, the bylaws obligation has to yield to

1 the republic's exercise of sovereign power in the legislation.
2 That is an issue of Argentine law pending before the Argentine
3 courts.

4 Given the size of the public controversy, it is
5 something that is uniquely well served for the Argentine courts
6 to decide. In much the same way that when the United States
7 makes major economic decisions within the country, such as
8 nationalizing the steel industry or rescuing the auto industry
9 a few years ago, it would strike us all as odd that that
10 decision would be litigated in Belgium or France or Germany or
11 some other country that might have some arguable interest in
12 the resolution of those issues. Those issues were best decided
13 in Argentina.

14 There is also the classic private interest factors the
15 courts weigh in *forum non conveniens* dismissal, where access to
16 proof is much greater in Argentina than it is here. The
17 documents are all in Spanish. The witnesses are all Spanish
18 speakers. The ability of U.S. courts to compel unwilling
19 witnesses, such as former employees either of YPF or Repsol or
20 the republic, those powers exist in Argentina but not here.

21 There is a whole confluence of factors that tip the
22 balance in favor of litigating the case in Argentina, the
23 preeminent one being the risk of inconsistent decisions between
24 a New York court and an Argentina court on how the bylaws
25 should be interpreted.

1 THE COURT: Any reply?

2 MR. HARRIS: Very briefly, your Honor. On the Foreign
3 Sovereign Immunities Act, we are not challenging the
4 expropriation. Your decision here will have no effect on
5 whether the shares were expropriated. It will have no effect
6 on whether Argentina controls YPF. All we are talking about is
7 a contractual requirement. No one disputes there is a
8 contractual requirement that is triggered by acquiring control.

9 And there is nothing sovereign about making a tender
10 offer or not. In fact, the whole purpose of these bylaws, of
11 article 28 of them, was to tell people that if Argentina takes
12 control, they will have this contractual requirement. It is
13 quite ironic for Argentina now to try and evade a bylaw
14 requirement that it put into effect in the 1993 IPO to
15 encourage U.S. investors, to now say, oh, I'm sorry, we are
16 immune, sorry, we told you that we have this right, but now we
17 are immune.

18 What we are looking at is a commercial requirement to
19 make a tender offer. The fact that it is an omission, that
20 this is about their failure to make the tender offer rather
21 than them actually having made the tender offer, that doesn't
22 render it not commercial. You can look at the Brocca case that
23 we cite where the court said that the failure to make a
24 required disclosure was commercial activity, or Weltover, which
25 was failure to make payments.

1 The mere fact that you choose not to comply with your
2 contracts doesn't mean it is not a contractual commercial
3 requirement. They should have made a tender offer in the U.S.
4 according to explicit terms of the bylaws. They didn't do so.
5 That is commercial activity.

6 On the Act of State doctrine, again, we are not
7 challenging the decision to expropriate. It simply cannot be
8 the case that once you take over a company, everything
9 contractually that follows is still a sovereign decision. That
10 is just not the case. Otherwise, once you appropriate a
11 company, you can just decide to not make payments, you can
12 decide not to follow guarantees, you can decide to do anything.
13 That tautology is not the Act of State doctrine.

14 You look at the actual actions that are supposed to be
15 taken at this point and ask whether those actions are
16 commercial. It is not just the expropriation that you look at.
17 You look at what happened after. What we are challenging here
18 is not the expropriation. It is whether they are now supposed
19 to follow the contractual requirements they imposed in 1993 to
20 make a tender offer.

21 On *forum non conveniens*, we are not litigating this
22 issue in Argentina. Repsol has not filed any lawsuit on behalf
23 of anyone seeking compensation for the shares or for the 49
24 percent of shares. What has been filed is a lawsuit against
25 YPF, not Argentina, that just seeks to void the shareholder

1 votes that were taken. That is a different defendant, that is
2 a different remedy. There is no lawsuit in Argentina in which
3 Repsol has sought to obtain a tender offer or other
4 compensation for these shares. It is just not true.

5 The last thing I would say is on the tender offer
6 requirement itself, the republic says, well, it doesn't apply
7 to expropriation. They focused you on article 7. But if you
8 look at section 28, the portion that your Honor directed them
9 to, this is explicitly about acquisitions by the national
10 government.

11 It is written as broadly as possible. It talks about
12 all acquisitions made by the national government "by any
13 means." It could not have been more broad or more an attempt
14 to encompass any kind of acquisition. It is not limited to
15 private acquisitions or expropriations. The whole purpose of
16 this was to protect private investors in case Argentina came
17 back and took over, and that is what it did.

18 The other thing I would say on this, they are argue
19 what does the term "acquisition" mean? I think that is what
20 this particular issue is about. Does "acquisition" mean you
21 have acquired legal title? That is their position. Or does it
22 mean other things as well? Is it satisfied if you acquire
23 ownership? I would say two things about that.

24 One is section 28 explicitly answers that question.
25 It says "Acquisitions. If as a consequence of such acquisition

1 the national government becomes the owner or exercises the
2 control of the shares." If "acquisition" meant what they said
3 it means, just becoming the owner, this whole clause would be
4 irrelevant and redundant. Instead, "acquisition" is a broad
5 term that is satisfied by either becoming the legal owner or
6 assuming control. That is what the bylaws say.

7 Even if there was an ambiguity, if you didn't know
8 what the term "acquisition" means in Argentina law, we
9 submitted an expert declaration from a former Argentina judge
10 that explained "acquisition" is a broad term, it is not limited
11 to obtaining legal indictment, it is also satisfied by
12 obtaining control. And they admit they have obtained control
13 of shares already. Or obtaining the rights associated with an
14 object, and they admit they have obtained all the rights
15 associated with the shares.

16 THE COURT: What is specified as to where and how the
17 tender offer is to be made?

18 MR. HARRIS: The bylaws in section 7(f), I believe,
19 say a number of things showing where the tender offer was to
20 take place.

21 THE COURT: Where is it to take place?

22 MR. HARRIS: Among the things that they are required
23 to do is publish the tender offer in the major newspapers of
24 the City of New York. They are also required to provide the
25 tender materials to the New York Stock Exchange and to provide

1 the tender materials to the SEC. Under U.S. law a tender
2 occurs where the information is distributed, where people are
3 located.

4 The tender offer itself occurs in many places because
5 the shareholders are in many places. But one of the places is
6 the U.S., and New York City in particular, where under the
7 explicit terms of the bylaws it is supposed to be published in
8 New York City newspapers and it is supposed to be provided to
9 the New York Stock Exchange.

10 The other thing I would say on this is that the bylaws
11 themselves recognize that the tender offer does not occur in
12 Argentina, where YPF is. But the tender offer occurs in many
13 places. How do we know that? If you look at 7(f), it says,
14 "Each takeover bid shall be conducted in accordance with the
15 procedures herein stipulated and to the extent that applicable
16 regulations in the jurisdictions," plural, "where the takeover
17 bid takes place."

18 The bylaws themselves, by using a plural term for
19 "jurisdictions" where the takeover bid takes place, they
20 recognize, which is consistent with U.S. law, that a takeover
21 bid takes place where the people who are making the tender are.
22 That's why the tender is supposed to have occurred in the U.S.,
23 because that is where the shareholders that are our class are,
24 that's where the New York City press article was supposed to be
25 published, that is where the New York Stock Exchange was

1 supposed to receive the tender materials, and that is where the
2 SEC was supposed to receive those materials. All that is
3 explicitly laid out in section 7(f) of the bylaws.

4 MR. SCARVALONE: Your Honor, if I might?

5 MR. HARRIS: Just one other thing. They are also
6 supposed to submit the tender offer to The Bank of New York
7 office here in New York. The bylaws are clear the tender offer
8 is going to occur in a number of places, but it explicitly
9 includes New York and the United States.

10 MR. SCARVALONE: Your Honor, I just have to correct
11 some oversights and misstatements, if I may.

12 THE COURT: What?

13 MR. SCARVALONE: I have to correct some I'm sure
14 inadvertent misstatements by counsel. There is no reference to
15 the New York Stock Exchange in the bylaws, none. There is no
16 reference to submissions to the SEC, none. The only securities
17 regulator is the Argentine securities regulator.

18 THE COURT: Where were you reading from?

19 MR. HARRIS: It is from 7(f). It talks about
20 applicable regulations in the jurisdictions where the takeover
21 bid takes place and the provisions of the stock exchanges where
22 the corporation's shares and securities are listed. That is
23 the New York Stock Exchange. That is 7(f), the second and
24 third lines of it, the provisions of the stock exchanges where
25 the corporation's shares and securities are listed. There is

1 no factual dispute that the majority of these shares are listed
2 on the New York Stock Exchange.

3 MR. SCARVALONE: Your Honor, the bottom line is there
4 is no requirement, as one would expect to find here, that an
5 expropriation would trigger the tender offer obligation. There
6 is no explicit requirement that a tender offer be made in the
7 United States. Just general reference, as Mr. Harris
8 indicated, to the jurisdictions where the tender offer will
9 take place. That is a very different animal than a requirement
10 that the tender offer be in the United States.

11 It is that distinction that takes our case out of,
12 separate and apart from, the cases that plaintiffs have cited
13 in their brief beginning with Weltover and Hanil Bank. Those
14 cases have explicit requirements that performance would be in
15 the U.S. That's not what we have here.

16 THE COURT: I'm trying to find 7(f). You are
17 referring to 7(f), right?

18 MR. HARRIS: 7(f), yes. Have you found that section?

19 THE COURT: Let me try to find 7(f). What is the
20 language that starts 7(f)?

21 MR. HARRIS: "Takeover bid," and then a colon.

22 THE COURT: Right. It is not very well printed here.
23 What is the language you are relying on as far as place?

24 MR. HARRIS: There are several things in here. One
25 would be at the end of the first line. "Each takeover bid

1 shall be conducted with the procedure herein stipulated and to
2 the extent that applicable regulations in the jurisdictions,"
3 plural, "where the takeover bid takes place."

4 So it is recognizing it is not just in Argentina, it
5 is in plural jurisdictions where the takeover bid takes place.
6 And the provisions of the stock exchanges where the
7 corporation's shares and securities are listed, that is the New
8 York Stock Exchange, among others, impose additional or
9 stricter requirements.

10 This recognizes a few things. One is that the
11 takeover bid occurs in multiple jurisdictions. It can't just
12 be where YPF is located. And it recognizes that you have to
13 comply with the provisions of the stock exchange where the
14 shares are regulated. That's the New York Stock Exchange. The
15 New York Stock Exchange rules, this is New York Stock Exchange
16 Rule 311.03, requires that the offering materials be delivered
17 to the New York Stock Exchange.

18 Also, the same language we just looked at that talks
19 about the regulations and the jurisdictions, the SEC is one of
20 those jurisdictions, and the SEC also requires a filing of the
21 tender offer materials themselves. That is SEC Rule 229.101.
22 Those are some of the things.

23 If you look further down in section (f)(iii), it says
24 they have to mail it to each shareholder. Again there is no
25 dispute that the bulk of the shareholders here have purchased

1 shares in the New York Stock Exchange. The bulk of the shares
2 at issue here are in the U.S. That's (iii). They have to mail
3 the materials to the U.S. shareholders.

4 Then, at the end of (iv), the very end of it says they
5 have to publish the materials in the business section of the
6 major newspapers of the Argentine republic, in the City of New
7 York, USA, and any other city where the shares shall be listed.

8 THE COURT: We have to go to the other lawsuit.
9 Having lived through about eleven years of litigation about the
10 bonds and having in mind the recent Court of Appeals decision
11 which makes it clear that the republic is not complying with
12 its contractual obligations, I have to say that it seems to me
13 that under pretty plain reading, there was a bylaw or bylaws
14 plural which were a commitment and are a commitment to have a
15 tender offer.

16 Section 28 specifically talks about, sets forth,
17 provisions applicable to acquisitions by the national
18 government. There is no way to kind of work around and get out
19 of the fact that there is going to be an acquisition or there
20 already is an acquisition. That means that there really was a
21 bylaw provision which was, in effect, a contractual obligation
22 set up to have a tender offer.

23 What we have is, it seems to me, another instance
24 where the Republic of Argentina won't comply with its
25 contractual obligations. It must be a habit down there. There

1 is an obligation here. There may be defenses, act of state,
2 foreign sovereign immunities, and so forth, but that really,
3 really doesn't erase the fact that there is an obligation.
4 There may be defenses. The republic always has a lot of
5 defenses. I have heard defenses by the republic for a dozen
6 years now. Usually they win.

7 But what is becoming recognized in our courts and
8 certainly recognized in the Court of Appeals is there is a
9 basic contractual obligation on the part of the republic, and
10 somehow that will get enforced. That is what we have here. We
11 have a very detailed description of what will happen if a party
12 gets to acquire a certain amount of the stock, and that thing
13 that will happen will be the tender offer.

14 Of course -- I shouldn't say of course. I shouldn't
15 expect evil. The republic didn't do it. What this lawsuit is
16 about is a very simple proposition: To get the republic to do
17 what it contracted to do.

18 I will reserve decision. I want to go to the other
19 lawsuit about Chevron.

20 MR. BROOME: Thank you, your Honor. Stephen Broome
21 from Quinn Emanuel on behalf of Repsol in the Repsol against
22 Chevron matter.

23 I will start by saying that I agree with all the
24 arguments that Mr. Harris made regarding the bylaw violations
25 being separate and distinct from the expropriation. The reason

1 that that is important in our case is that we have asserted
2 claims, various claims, against Chevron: Tortious interference
3 with the bylaws, aiding and abetting, breach of fiduciary duty
4 for not complying with the bylaws. We have sought declaratory
5 and injunctive relief. The only basis that Chevron has
6 asserted for dismissing those claims is not that we have failed
7 to properly or adequately allege our claims. The sole basis
8 that they have asserted is act of state.

9 We really come back to the arguments that you were
10 just having or the arguments that Mr. Harris and Mr. Scarvalone
11 were just having about whether or not Argentina's breach of the
12 bylaws constitutes an act of state. Our view, of course, is
13 that it does not. What we are talking about here is a very
14 simple contractual matter.

15 Argentina came into this country, they launched an IPO
16 as the sole shareholder of YPF. They said don't worry, we
17 won't expropriate your shares because we have this specific
18 tender offer requirement. Then they changed their mind when
19 the company became incredibly profitable and said we are going
20 to expropriate it, we are taking it back, the bylaw requirement
21 doesn't apply to us anymore.

22 We have made claims against Chevron because what
23 Chevron has done, despite the fact that there has been these
24 bylaw violations and despite the fact that the bylaws make very
25 clear that shares that are expropriated --

1 THE COURT: It seems to me the essence of your claim
2 against Chevron is tort claims for interference with business
3 relationships and contractual relationships. Isn't that right?
4

5 MR. BROOME: That's close, your Honor. Our claim is
6 that Chevron has tortiously interfered with our rights under
7 the bylaws. You have to remember that we are talking about an
8 energy company here. Repsol ran this company for over a
9 decade. When Argentina came in and forcibly removed the people
10 who were running that company, they didn't have the
11 institutional knowledge to run a company like that. They
12 didn't have the resources or the knowledge to develop the oil
13 fields that really are the value that is at issue here, the
14 reason that Argentina made this expropriation.

15 What they did, as we allege in the complaint, is they
16 went to companies like Chevron and said we will give you a
17 better deal if you come in and you will overlook our bylaw
18 violations, we are going to expropriate the company --

19 THE COURT: I don't understand. What relief are you
20 seeking in this lawsuit against Chevron? What relief are you
21 seeking?

22 MR. BROOME: We are seeking a declaration that the
23 agreement that Chevron entered into with YPF is invalid.

24 THE COURT: Say that again a little slower.

25 MR. BROOME: Sorry. We are seeking a declaration that
initially it was a memorandum of understanding that Chevron and

1 YPF had entered into is invalid because the officers and
2 directors -- sorry -- really just the officers of YPF that
3 entered into that agreement with Chevron did not have authority
4 to bind the company, because under the bylaws -- sorry. Let me
5 take a step back.

6 Those officers were appointed by Argentina, not by
7 Repsol. Argentina under the bylaws did not have authority to
8 appoint those officers, and Chevron knew that. Our allegation
9 is that that agreement should be declared invalid.

10 THE COURT: Why didn't they have authority?

11 MR. BROOME: The bylaw provision that we looked at
12 earlier, your Honor, in sections 7 and 28, if that bylaw
13 provision is not complied with, then it strips the holder of
14 the shares of the rights to vote or the rights to dividends.

15 In order to appoint the officers that entered into the
16 agreements with Chevron, Argentina needed the right to vote.
17 They needed the right to vote those officers into office. But
18 they didn't do that. Instead, what they did is they forcibly
19 removed the current executives that were properly appointed by
20 our client, Repsol, and they replaced them with government
21 appointees. That was a bylaw violation. That was a highly
22 publicized bylaw violation that Chevron was well aware of.

23 THE COURT: What bylaw? Are we back to the tender
24 offer?

25 MR. BROOME: Yes, it relates to the tender offer

1 requirement, your Honor. Absent a tender offer, if there is no
2 tender offer, the person who holds the shares has no right to
3 dividends and has no rights at all under the shares.

4 THE COURT: I don't mean to be stubborn, but I think
5 your complaint alleges interference with business
6 relationships, tortious interference with business
7 relationships, doesn't it? Isn't that one of the claims?

8 MR. BROOME: Tortious interference with contracts,
9 your Honor, and the contract is the bylaws. It is the third
10 claim for relief in the complaint.

11 THE COURT: How did they tortiously interfere with the
12 bylaw?

13 MR. BROOME: In a number of ways, your Honor. What we
14 have alleged in the complaint is that Argentina needed a
15 partner. Mr. Galluccio, who is the CEO of YPF now, who has
16 been appointed by Argentina, has made very clear that now that
17 they have kicked our client, Repsol, out and no longer have
18 access to Repsol's institutional knowledge as to how to run the
19 company and its other resources, financial, capital,
20 intellectual resources, it can't run the company without a
21 partner. Chevron is that partner.

22 We have alleged that Chevron engaged in tortious
23 interference both before the expropriation by having secret
24 meetings with Argentina in which Argentina asked Chevron if
25 they would partner with Repsol if they made the expropriation,

1 if they executed the expropriation, and after the expropriation
2 Chevron has entered into multiple agreements despite knowing
3 that the people with whom it is entering these agreements, the
4 government-appointed managers of YPF, lack authority to bind
5 the company because they are not appointed in accordance with
6 the bylaws.

7 THE COURT: To get back to the bylaw -- and I'm not
8 Repsol's attorney and I don't want to give Repsol legal advice,
9 and I'm not trying to do that, but I'm the judge here and I'm
10 looking at the case and seeing what the claims are. Aside from
11 the bylaw, it seems to me what Repsol is alleging as far as
12 Chevron is Repsol had a very valuable business relationship
13 with YPF, right?

14 MR. BROOME: Repsol was the majority owner of YPF.

15 THE COURT: I mean they did a lot of business for YPF.

16 MR. BROOME: They were the majority owner. They ran
17 an controlled YPF. They appointed all the board of directors.

18 THE COURT: I'm talking about looking for things like
19 oil. They did a lot of work, didn't they?

20 MR. BROOME: Absolutely, your Honor. They invested
21 millions of dollars.

22 THE COURT: Can we focus on that for a moment?

23 MR. BROOME: Sure.

24 THE COURT: Put aside for the moment the perennial
25 bylaw. Over a period of years, aside from whether they owned

1 51 percent or not, they were doing a lot of work for YPF,
2 right?

3 MR. BROOME: That's correct, your Honor.

4 THE COURT: Exploring for oil, and so forth, natural
5 gas, and so forth?

6 MR. BROOME: Yes.

7 THE COURT: They spent a lot of money, right?

8 MR. BROOME: They certainly did, your Honor.

9 THE COURT: Finally they found things, right?

10 MR. BROOME: That's right.

11 THE COURT: To anybody past the third grade, that is a
12 very valuable business relationship, right?

13 MR. BROOME: Absolutely, your Honor.

14 THE COURT: I don't know that Chevron did or did not
15 do this, but if Chevron begins to have communications that are
16 not exactly public and begins to make efforts to try to get
17 that business, is that something you are alleging?

18 MR. BROOME: Yes.

19 THE COURT: Forget the bylaw for a minute. I think
20 you said and I think your papers say that Chevron entered into
21 discussions with either the head of YPF or somebody at YPF
22 about getting in there and doing this work. Am I right?

23 MR. BROOME: Yes.

24 THE COURT: You are alleging that, right?

25 MR. BROOME: Yes, your Honor.

1 THE COURT: Obviously, Chevron has a right to compete
2 and YPF has a right to be dissatisfied with Repsol and has a
3 right to get a new fellow to come in and do the exploration,
4 and so forth, right? But there can be circumstances where
5 somebody doesn't compete in an aboveboard way and does it
6 differently, and that constitutes the tort of interference with
7 contract or interference with business relationships, right?

8 MR. BROOME: That's correct, your Honor.

9 THE COURT: You are alleging that in your claim
10 against Chevron, are you not?

11 MR. BROOME: That's correct.

12 THE COURT: Now let me hear from Chevron. I don't
13 understand how there is any defense to that kind of a claim
14 based on the Act of State doctrine. I don't understand how
15 there is any application whatever of the Act of State doctrine
16 to that kind of a claim.

17 MR. SOMMER: Judge, the answer to your question may be
18 that there isn't, but the problem is there is no such
19 allegation in the complaint.

20 Let me take two minutes to put Chevron in context, and
21 then I will address the arguments by counsel. Everything you
22 heard from counsel this morning for about an hour about some
23 very fascinating and difficult legal issues about how to deal
24 with the 49 percent that wasn't appropriated given the fact of
25 life that your Honor has acknowledged and whether the bylaws

1 require a tender offer or not has zero application to the case
2 against Chevron. The case against Chevron has nothing to do
3 with that 49 percent.

4 THE COURT: I know that.

5 MR. SOMMER: OK. So we are dealing with the 51
6 percent that was expropriated. By the way, Judge, just to put
7 Repsol in context, Repsol was the majority owner of YPF. They
8 weren't a company doing a deal here that Chevron is now doing.
9 It is just the opposite. As the owner of YPF, Repsol invited
10 Chevron to come work with them on this particular deal. Repsol
11 did, not the republic. Repsol owned and controlled YPF. They
12 invited Chevron to participate in this venture.

13 The only thing that has changed vis-a-vis Chevron is
14 the ownership of that 51 percent, which is no longer owned by
15 Repsol but, under your fact of life that that's what's going to
16 happen, is owned by the Republic of Argentina.

17 There are five claims asserted against Chevron, your
18 Honor. I'll go right through them very quickly. Every single
19 one of them requires your Honor to find that the Expropriation
20 Act is invalid. That is what the Act of State doctrine teaches
21 us a court in the United States should not do.

22 Judge, what I find somewhat remarkable is that counsel
23 for Repsol sitting to your right stands up before you and says
24 Repsol is not challenging the Expropriation Act at all. Then
25 Repsol counsel sitting to your left in his complaint is

1 challenging that exact same thing.

2 Let's take tortious interference, since that is the
3 one your Honor focused on. What is the tortious interference
4 alleged in this complaint? It is one thing and one thing
5 alone, Judge. It is the allegation that Chevron somehow
6 induced YPF not to comply with the bylaws, with the tender
7 offer. That is the only thing alleged. What your Honor has
8 described is conduct that never happened and never is alleged.

9 Chevron didn't swoop in and somehow improperly take a
10 deal that Repsol was doing for YPF. That never happened. That
11 is not in the complaint at all. That is just absolutely not
12 so. Repsol was the majority owner of YPF. They asked Chevron
13 to partner with YPF. And that's all Chevron has done. The
14 only thing that changed vis-a-vis Chevron is there was a
15 different boss in town. It is now the Republic of Argentina.

16 But there is not the slightest allegation that Chevron
17 came in here and stole a deal from Repsol. There is zero in
18 the complaint on that. Counsel for Repsol should have told you
19 that three minutes ago when you asked that question. That is
20 not in the complaint.

21 Every single one of the five claims requires your
22 Honor to find the Expropriation Act invalid. Aiding and
23 abetting. Your Honor instructs juries sitting over here all
24 the time about what aiding and abetting is. It is a derivative
25 liability. You have to find the principal to have violated

1 something first. Here the only alleged violation is the
2 failure to comply with the bylaws. But to find that that is a
3 violation, you have to find the Expropriation Act invalid.

4 Judge, this is the most plain-vanilla case I can think
5 of for the Act of State doctrine to apply. Every one of these
6 claims, as I have said, would require your Honor to find the
7 act invalid. They cannot articulate a single one that would
8 not require such a finding by your Honor.

9 To declare that the managers don't have authority
10 means that the Expropriation Act is invalid. To declare that
11 the memorandum of understanding has no force is to declare that
12 the Expropriation Act is invalid, because it was that act
13 itself which put the managers in charge.

14 Tortious interference under New York law requires an
15 underlying breach. What is the alleged breach? The breach is
16 that we didn't comply with the bylaws. But that's only a
17 breach if the Expropriation Act is invalid. If it's valid,
18 then the conduct by YPF in dealing with Chevron is perfectly
19 lawful.

20 Think about it in these terms, Judge. We have two
21 roads. Road A is the bylaws route. You have to do a tender
22 offer, that's what you said you would do, Republic, that's what
23 you said you would do. Road B says we are now creating a new
24 mechanism for Argentina to acquire these shares, not following
25 road A, it's road B, and it is called the Expropriation Act.

1 If that act is valid, then there is no breach of contract,
2 because there is an alternative methodology now in place to
3 acquire the shares and compensate the shareholders.

4 Every one of these claims comes back to the Act of
5 State doctrine. You cannot avoid it. And in their opposition
6 brief and in their arguments to your Honor today, they have
7 failed to identify a single one of their claims that can be
8 determined in this court without a finding of invalidity of the
9 act.

10 They have not cited a single case that says this
11 conduct falls outside the scope of the Act of State doctrine,
12 not one. In fact, they have done just the opposite. They have
13 misrepresented cases to your Honor, Foreign Sovereign Immunity
14 Act cases, that have absolutely no application to the Act of
15 State doctrine.

16 I completely understand your Honor's premise that was
17 before me when I first stood up: Could a cause of action be
18 articulated under the theory your Honor articulated if Chevron
19 swooped in and stole a deal from Repsol using improper means?
20 I imagine the answer to that question is probably yes. But
21 nothing of the sort happened here. Nothing is pled in the
22 complaint.

23 As I said before, I'm not trying to be unfair to
24 counsel here. He should have told you that himself because
25 that is not part of the case. Repsol is not some party out

1 there that had a contract with YPF. Repsol was simply the
2 majority owner of YPF that invited Chevron to this deal.

3 Your Honor, for clarity -- I don't know what you are
4 flipping through, maybe I can help you find what you are
5 looking for -- if you look at their complaint at page 23, that
6 is the tortious interference claim. It begins at paragraph 79,
7 but it is really paragraphs 80 and 83 that make this so clear.
8 It talks about the contract being the company's bylaws and that
9 the alleged tortious interference by Chevron was to somehow
10 induce a breach of the bylaws, not some other contract out
11 there, some mystery contract that is never once mentioned or
12 alluded to in the complaint and which as a matter of fact does
13 not exist.

14 One other point on the tortious interference, as I
15 know your Honor focused on that. The complaint makes clear
16 that the tortious interference claim here is post-expropriation
17 conduct. In other words, it is after the Republic of Argentina
18 has control of the company.

19 Conduct by Chevron after the fact can't be a tortious
20 interference of a contract. In other words, under New York law
21 tortious interference requires that Chevron's conduct was a
22 substantial factor in causing the breach. So any post-
23 expropriation conduct is irrelevant and any pre-expropriation
24 conduct again must assume -- first of all, if it is before the
25 Expropriation Act, there has been no breach at all. Again, it

1 must assume that the act itself is invalid, and that is
2 precisely what the Act of State doctrine says this Court should
3 not do.

4 THE COURT: I want to start with one thing, and that
5 is this. If there is in this complaint an allegation of
6 tortious interference with contract, it is no defense to
7 Chevron, the act of state. In other words, if there is an
8 allegation of a tort committed by Chevron, a tort committed by
9 Chevron, I emphasize that, the Act of State doctrine is not a
10 defense.

11 MR. SOMMER: I disagree with the premise, your Honor,
12 and I'll address that very promptly if you would like.

13 THE COURT: Just a minute. I want to clear that out.
14 Now the question is, is there really a tort here alleged
15 against Chevron? If we could focus on that and not on act of
16 state. I don't want to hold this action open against Chevron
17 if there really isn't any substantial allegation against
18 Chevron about a tort committed by Chevron, but I don't want to
19 dismiss the case if there is a claim of any substance against
20 Chevron. There has been so much discussion of the bylaw, and
21 so forth, and all these other things. That remains to me the
22 issue.

23 I have to say that I do not find a lot of substance in
24 the idea that Chevron somehow procured the violation of a
25 bylaw. I don't find that that is very much of a claim of

1 substance. I am going to go back to plaintiffs' counsel and I
2 will tell you I will hold this action open only if you are
3 making a claim, and I mean only if you are making a claim, that
4 Chevron somehow committed a tort of interference with business
5 relationships or interference with contracts, not about the
6 carrying out of the bylaw but about the business that was being
7 done by your client with the company.

8 MR. BROOME: Sure, your Honor. One point let me make
9 at the outset. Chevron did not challenge the sufficiency of
10 our pleadings on the tortious interference claim, so that
11 argument, if they were to make it now, has been waived. But we
12 have pled a tortious interference claim, which is why they
13 didn't challenge it. You will see at paragraphs 51 and 52 of
14 the complaint we say that it was essential for Argentina to
15 know before implementing its scheme to expropriate --

16 THE COURT: Wait a minute.

17 MR. BROOME: Maybe start at paragraph 50 on page 15.

18 THE COURT: I'm at 50.

19 MR. BROOME: We allege that Chevron was aware that
20 without Repsol, YPF lacks the capability to implement a plan
21 for developing these energy assets. Then at 51 we say it was
22 essential for Argentina to know that it would have a willing
23 business partner if it kicked Repsol out.

24 THE COURT: I'm sorry. It what?

25 MR. BROOME: At 51 we say it was essential for

1 Argentina to know that it would have a major oil company, like
2 Repsol was or like Chevron is, to assist it in developing these
3 energy assets which are at issue in the vaca muerta formation.

4 Mr. Sommer said earlier that Repsol had invited
5 Chevron pre-expropriation to come participate in the
6 development of the vaca muerta. That is true to some extent,
7 but it is not entirely true. What happened is Repsol had asked
8 Chevron to enter into negotiations for a potential partnership.
9 Those negotiations stopped.

10 Little did Repsol know that meanwhile Chevron was also
11 having negotiations with Argentina at the same time that it was
12 having negotiations with us in which Argentina asked Chevron if
13 it would participate as a partner to develop these assets
14 without Repsol if Argentina expropriated the assets.

15 Chevron's response, what we allege, is that they
16 agreed to do that if they could get a better deal. So, what
17 this was really about, your Honor, is Chevron getting a better
18 deal to develop these energy assets with YPF, because YPF
19 needed Chevron, than the deal it could get with our client,
20 Repsol, because Repsol didn't need Chevron.

21 Your Honor, a lot of oil companies around the world
22 have made the point that we are making here, that Chevron was
23 jumping at the chance to obtain these assets at Repsol's
24 expense at fire sale prices. Total refused to jump at that
25 chance. Chevron said they didn't have a problem with it. So

1 there is the pre-expropriation --

2 THE COURT: What did you just say? Who did not have a
3 problem?

4 MR. BROOME: Total, an oil company from France.

5 THE COURT: What about Total?

6 MR. BROOME: They had said that they were not going to
7 enter into agreements with YPF after the expropriation because
8 they didn't want to jump at the chance to get these assets at
9 fire sale prices -- I'm paraphrasing here, of course; we have
10 the quote in our brief -- unlike Chevron.

11 THE COURT: Where in your brief? This is your main
12 brief in this motion?

13 MR. BROOME: Yes, your Honor, our opposition.

14 THE COURT: What page?

15 MR. BROOME: It's page 8. At the bottom of page 8
16 there is a paragraph that begins, "Chevron's willingness to
17 encourage Argentina and to give assurances that it would stand
18 by Argentina and thereby capitalize on Argentina's seizure of
19 Repsol's majority interest in YPF in violation of company's
20 bylaws is in stark contrast with that of other major players in
21 the industry. Christophe de Margerie, the chairman and CEO of
22 Total, stated that, 'Unlike Chevron, Total is not going to take
23 advantage of Repsol and leap at assets that may well be cheaper
24 given the situation. That's not our style.'"

25 Really the point, your Honor, is that this has been

1 highly publicized, and there has been a lot of criticism,
2 international criticism, of Chevron's willingness to do
3 business with Argentina really at Repsol's expense.

4 MR. SOMMER: Judge, may I respond?

5 THE COURT: It is 1 o'clock.

6 MR. SOMMER: Two minutes, I promise.

7 THE COURT: What I would like to do is this. I'm
8 saying right now that in my view the Act of State doctrine is
9 not a defense to the claim against Chevron. The real problem
10 about whether to dismiss or not to dismiss the case against
11 Chevron is whether there really is a pleading that is a
12 satisfactory allegation of tort committed by Chevron.

13 I really have to say I'm not talking about the tort of
14 somehow dealing with that bylaw. I'm talking about basically
15 what I think you're talking about at page 8 of your brief. But
16 we discussed so many things this morning and there has been all
17 this attention given to the bylaw.

18 What I would really like to do is to have another
19 session where the plaintiff's attorneys in the suit against
20 Chevron and Chevron's attorney will come in and address the
21 issues which I want to focus on and not talk about a lot of
22 other issues.

23 MR. SOMMER: I think that makes a lot of good sense,
24 Judge.

25 THE COURT: I think we have to really call it a day

1 right now as far as this argument this morning.

2 On the other issues, I am reserving decision. I would
3 like to have you work out with my deputy clerk a time sometime
4 after the 30th of September, because I am trying to get motions
5 done, when you can come in and discuss what I am talking about
6 now.

7 MR. SOMMER: We will find dates and contact Mr. Beale
8 and schedule that, your Honor.

9 THE COURT: Thank you very much.

10 (Adjourned)

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